



## INTERIOR BOARD OF INDIAN APPEALS

Big Mountain Lodge, Inc. v. Alaska Regional Director, Bureau of Indian Affairs

40 IBIA 281 (04/01/2005)



## United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
801 NORTH QUINCY STREET  
SUITE 300  
ARLINGTON, VA 22203

BIG MOUNTAIN LODGE, INC.,	:	Order Affirming Decision
Appellant,	:	
	:	
v.	:	
	:	Docket No. IBIA 03-130-A
ALASKA REGIONAL DIRECTOR,	:	
BUREAU OF INDIAN AFFAIRS,	:	
Appellee.	:	April 1, 2005

Appellant Big Mountain Lodge, Inc., seeks review of a June 23, 2003, decision of the Alaska Regional Director, Bureau of Indian Affairs (Regional Director; BIA), affirming the cancellation of Lease No. 92-L-02 for Alaska Native Allotment AA-06277, under which Gabby Gregory (Gregory) was the lessor and Appellant was the tenant. 1/ For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

### Background

Lease No. 92-L-02 covered a 14.057-acre portion of Allotment AA-06277. The lease was approved by the Superintendent, Anchorage Agency, BIA, on November 24, 1992, for a term of 25 years, beginning on September 1, 1992, and ending on August 31, 2017. The stated purposes of the lease were construction and operation of a fishing and hunting lodge and use of the premises to support related recreational activities.

Rent was initially set at \$1,166.67 per month. 2/ Rent was payable in monthly installments, due by the first of each month. The lease stated that if a monthly payment was not made within 30 days of its due date, interest would be charged at the rate of 18% per year payable from the date the rent payment became due until the payment was made. In addition, the lease provided that an administrative fee would be charged if the rent was not paid within 30 days after its due date.

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1/ The lease was signed by Frank Plunk on behalf of Appellant. Plunk later sold Appellant Corporation to Phillip Paul Weidner & Associates.

2/ The monthly rent was later adjusted to \$1,616.67. The rental increase is not an issue in this appeal.

Lease Provision 16, DEFAULT, provided:

Time is of the essence of this lease. Should TENANT default in any payment of monies or fail to post bond, as required by the terms of this lease, and if such default shall continue uncured for the period of 10 days after written notice thereof by the Secretary to TENANT, \* \* \* then the LESSOR or the Secretary may:

A. Proceed under the terms of 25 C.F.R. 162.14 [(1992) 3/], by suit or otherwise to enforce collection \* \* \*.

B. Reenter the premises and remove all persons and property therefrom, excluding the persons and property belonging to authorized subleases, and either,

(1) Relet the premises without terminating this lease, \* \* \* or

(2) Terminate this lease at any time even though LESSOR and the Secretary have exercised rights as outlined in (1) above.

During all times relevant to this appeal, BIA's day-to-day lease administration responsibilities were carried out by the Bristol Bay Native Association (BBNA) under a Self-Governance compact and annual funding agreement under the Indian Self-Determination Act, 25 U.S.C. §§ 450-450n.

In 1999, Appellant began to fall behind in its rental payments, periodically making payments covering rent for several months and including interest in the payments. BBNA repeatedly wrote to Appellant concerning its arrearages. In 2002, after writing to Appellant in February, April, May, and June, BBNA wrote again on September 24, 2002, at which time Appellant owed rent for May through September 2002. BBNA stated that Gregory had requested cancellation of the lease under Provision 16 unless the overdue rent was paid by October 10, 2002.

Appellant responded on October 2, 2002, explaining that its arrearages were largely due to a decrease in business resulting from diminished salmon returns and related fish and game

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3/ 25 C.F.R. § 162.14 (1992) was titled "Violation of lease" and included procedures for cancellation of a lease. The version of 25 C.F.R. Part 162 which was in effect in 1992 remained in effect until Mar. 23, 2001, when it was superseded by the present version. See 66 Fed. Reg. 7109 (Jan. 22, 2001).

As relevant to the lease at issue here, 25 C.F.R. § 162.14 (1992) was superseded by 25 C.F.R. §§ 162.617-162.621 in the present regulations.

restrictions. It acknowledged that it had a cash flow problem, offered to pay Gregory with a boat and motor, requested a 30-day extension of time, and stated that it would try to sublease the premises in 30 to 60 days.

BBNA wrote to Gregory on October 7, 2002, informing him of Appellant's October 2, 2002, letter and enclosing a questionnaire, seeking Gregory's responses to three questions, which were framed as either-or choices. Gregory completed the questionnaire on October 9, 2002. In response to the first two questions, he indicated that he wanted the lease cancelled and would not accept the offer of a boat and motor as payment. The third question concerned the possibility of a sublease and offered Gregory two alternatives: "Yes, I will allow [Appellant] to sublease my property" or "No, I do not want [Appellant] to sublease my land to someone that I do not know." In response to that question, he placed an "x" in the box next to the "No" alternative.

BBNA forwarded the completed questionnaire to Appellant on October 11, 2002. On October 21, 2002, BBNA formally advised Appellant that Gregory wanted to proceed with lease cancellation, would not accept Appellant's offer of a boat and motor, and "does not want to agree to a sublease to someone he does not know and who may not be sensitive to subsistence needs of the villagers of Igiugig and Levelock." BBNA's October 21, 2002, letter also stated that Appellant now owed rent for six months, May through October, 2002, in the amount of \$10,150.90, including interest. <sup>4/</sup> The letter gave Appellant 10 days to make the payment or face cancellation of the lease. Appellant did not respond. On November 12, 2002, BBNA again wrote to Appellant, stating that Appellant was now seven months in arrears and that BBNA would begin cancellation proceedings. BBNA also stated that Appellant would receive a copy of the cancellation notice approved by BIA and would have the right to appeal from that notice.

On December 11, 2002, BIA's Field Representative, West-Central Alaska Field Office, signed a document titled "CANCELLATION OF LEASE," which gave three reasons for cancellation. The first was "non-payment of rent for a period of seven months and repeated late payments over the course of three years." Cancellation of Lease at 1. The second and third reasons for cancellation concerned evidence of insurance and submission of a rental bond. <sup>5/</sup>

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<sup>4/</sup> It does not appear that BBNA ever assessed administrative fees against Appellant, even though the lease required assessment of such fees "if the rent is not paid within 30 days after becoming due."

<sup>5/</sup> As to the second and third reasons, the Regional Director concedes that Appellant was not given notice and an opportunity to cure, as required by 25 C.F.R. § 162.618. He asks the Board to affirm his decision based solely on Appellant's failure to pay rent. Regional Director's Answer Br. at 16-17.

BBNA mailed the lease cancellation document to Appellant on January 3, 2003, with a cover letter describing Appellant's right to appeal.

Appellant appealed the lease cancellation to the Regional Director, who affirmed it on June 23, 2003.

Appellant then appealed to the Board. Before any briefs were filed, the parties entered into settlement negotiations, and the Board stayed proceedings. Briefing was completed 6/ after the parties informed the Board of the failure of their negotiations.

#### Discussion and Conclusions

Appellant's principal argument is that its continued failure to pay rent 7/ should be excused because Gregory unreasonably withheld consent to a sublease. Appellant also alleges that several defects in the notice and cancellation proceedings rendered the cancellation invalid.

In support of its principal argument, Appellant cites Lease Provision 12, ASSIGNMENT, which provides: "TENANT may not sublease, assign, amend or encumber this lease without the approval of the Secretary and the written consent of all parties to the lease, including any surety or sureties. Such consent shall not be unreasonably withheld." Appellant argues that Gregory unreasonably withheld consent to a sublease when he placed an "x" in a box on the questionnaire sent to him by BBNA, indicating that he did not want Appellant to sublease to someone he did not know.

Appellant characterizes its argument as one based on estoppel and contends that, if Gregory "had allowed a sublessee, as permitted, the rent payments would \* \* \* have remained current." Appellant's Reply Brief at 9.

Appellant fails to address the elements of estoppel, 8/ let alone show how they apply to this case. Further, even assuming Gregory's completion of the questionnaire on October 9, 2002, might have hampered Appellant's ability to find a sublessee and thus to pay rent after October 9, 2002, Appellant offers no theory under which Gregory's act could have retroactively

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6/ With his answer brief, the Regional Director filed a motion for appeal bond. This decision renders his motion moot.

7/ There is no indication that Appellant has paid any rent since April 2002, despite the requirement in 25 C.F.R. § 162.621 that a tenant continue to pay rent while a cancellation decision is on appeal and therefore ineffective.

8/ The elements of estoppel were recently discussed in Thompson v. Acting Northwest Regional Director, 40 IBIA 216, 227-28 (2005).

affected Appellant's ability to pay rent for the period May through October 2002. Appellant's estoppel argument fails.

The Regional Director argues that Appellant never presented a sublease for approval and Appellant does not allege that it ever did so. Instead, it makes only the most general claims regarding its subleasing possibilities and fails to describe the terms of any proposed sublease. The strongest statement it is able to muster appears in an affidavit from its General Manager, who states that certain individuals, most of whose full names he cannot supply, had expressed interest in leasing or subleasing.

Gregory's completion of the questionnaire on October 9, 2002, did not constitute the withholding of consent to any sublease. His only act was to choose between two alternatives presented to him by BBNA in the most general terms. No sublease, nor any description of a proposed sublease, had been presented for his consent. Thus Gregory cannot be deemed to have unreasonably withheld consent to a sublease or to have violated Lease Provision 12.

Accordingly, Appellant has failed to show that any act by Gregory excused Appellant's failure to pay rent.

The alleged procedural deficiencies identified by Appellant are for the most part—in the words applied by the Regional Director to one of them—“terminological ‘nit-pick[s].’” Regional Director's Answer Br. at 17. For example, Appellant contends that the cancellation was deficient because it identified the tenant as “Frank Plunk owner of Big Mountain Lodge” and stated that the lease was taken over by Phillip Paul Weidner & Associates in May 1995. Appellant states that the actual tenant, *i.e.*, Appellant itself, is a corporate entity which was sold, as a corporate entity, to Weidner. Appellant's Supplemental Statement of Reasons at 1-2. Appellant fails to show that it was prejudiced by the minor misstatement in the cancellation document concerning the identity of the tenant.

Appellant also complains that notice of appeal rights was not included in the lease cancellation document. As stated above, notice of appeal rights was included in the cover letter sent to Appellant with the cancellation document. Appellant received that notice and exercised its appeal rights. Appellant fails to show that it was prejudiced merely because its appeal rights were described in the cover letter rather than in the cancellation document.

Appellant correctly notes that the cancellation document did not include a statement of “the amount of any unpaid rent, interest charges, or late payment penalties due under the lease.” 25 C.F.R. § 162.619(c)(2) requires that this information be included in a cancellation letter, and BIA erred in failing to include it. However, Appellant was well aware of the amount of rent it owed. Moreover, it had received notice, through BBNA's October 21, 2002, letter, of the amount of interest then due and was evidently capable of calculating interest itself, as

evidenced by its October 1, 2001, letter, in which it described its calculations of interest due at that time.

Given Appellant's knowledge about its overdue rent and interest, it cannot claim that it was prejudiced by BIA's failure to include that information in the cancellation document. Under the circumstances of this case, where Appellant cannot claim prejudice resulting from BIA's error, and where Appellant's default has been of long duration and is apparently still continuing, BIA's error does not require that the cancellation decision be vacated. 9/

Appellant's remaining allegations of procedural deficiencies have been considered and rejected.

Pursuant to the authority delegated to the Board by the Secretary of the Interior, 43 C.F.R. § 4.1, the Regional Director's June 23, 2003, decision is affirmed. This decision is final for the Department of the Interior.

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// original signed  
Colette J. Winston  
Administrative Judge

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// original signed  
Anita Vogt  
Senior Administrative Judge

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9/ However, the Regional Director is requested to ensure that BIA employees under his supervision, as well as contractors, follow the requirements of the lease cancellation provisions of 25 C.F.R. Part 162. He is also requested to ensure that prompt action is taken when a lease violation occurs.